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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JULIAN HANBERG,

Plaintiff and Appellant,

v.

DAN DITTBERNER et al.,

Defendants and Respondents.

B210965

(Los Angeles County  
Super. Ct. No. SC 091031)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry B. Friedman, Judge. Affirmed.

Law Office of Michael S. Braun, Michael S. Braun and Kevin A. Gordon for  
Plaintiff and Appellant.

No appearance for Defendants and Respondents.

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This appeal purports to be from an order denying a motion for reconsideration. Such an order is not appealable. (*Rojas v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1161.) *Following the filing of the notice of appeal*, the trial court entered judgment. When, as here, an appeal is taken from a nonappealable order and a judgment is subsequently entered in the case, we have the discretion to treat the appeal as one taken from the judgment. (*Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 69.) Under the circumstances that obtain here, the appeal is deemed to be filed immediately after the entry of judgment. (Cal. Rules of Court, rule 8.104(d).) We address the appeal on the merits and affirm the judgment.

### **FACTS AND PROCEDURAL HISTORY**

Appellant Julian Hanberg brought an action against Dan Dittberner and Pacific Mold Pros, LLC for breach of contract. The claim was that the defendants failed to perform mold removal as they had agreed to do. The defendants did not enter an appearance and their default was taken. They have not appeared in this appeal.

The prove-up hearing on the default was held on May 23, 2008. Appellant took the stand and testified about the damages he sustained to a duplex that he owns in Culver City as a result of the defendants' failure to remove the mold from this property. Appellant claimed to have paid \$75,000 to his carrier, Farmers Insurance Company, who then paid out this and other sums to the tenants. When the trial court asked for documentation for this, appellant first stated that he had such documentation but a little later acknowledged that he did not have these documents with him. At the conclusion of the hearing, the trial court stated that the court awarded \$8,655 to appellant. This ruling amounted to a rendition of judgment.

On June 2, 2008, appellant filed a motion for reconsideration in which he sought to add \$75,000 to the judgment. The motion was supported by a letter that stated that appellant had paid \$75,000 to Farmers Insurance, who then turned this over to the tenants, along with additional funds from Farmers Insurance. On September 2, 2008, the trial court, per the same judicial officer who had presided over the prove-up hearing, denied the motion for reconsideration on the ground that appellant had only shown in his

motion that his failure to produce the document about the payment of \$75,000 during the hearing on May 23, 2008, was due to his inexcusable neglect in not bringing the document to the hearing. There were therefore no grounds justifying a reconsideration of the judgment entered.

Appellant's notice of appeal, filed on September 15, 2008, states that the appeal is from the order denying his motion for reconsideration.

Although it does not appear in the clerk's transcript, our records contain a copy of a "Judgment by Court After Default" entered on October 15, 2008. This judgment awards appellant \$8,655 in general damages and \$859.20 in filing fees and costs for a total judgment of \$9,514.20.

Appellant's opening brief states that the "Notice of Appeal from the judgment was timely filed on July 25, 2006." Appellant has clarified that this statement is erroneous and that the notice of appeal filed on September 15, 2008 is the only notice of appeal that was filed.

### **THE MOTION FOR RECONSIDERATION**

Appellant's motion for reconsideration had to be based on "new or different facts, circumstances, or law."<sup>1</sup> The requirements of Code of Civil Procedure section 1008, in setting forth the grounds for an order granting reconsideration, are jurisdictional. This is so in terms of both statutory<sup>2</sup> and decisional law. (*Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485, 492.)

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<sup>1</sup> "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon *new or different facts, circumstances, or law*, make application to the same judge or court that made the order, *to reconsider the matter* and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (Code Civ. Proc., § 1008, subd. (a).)

<sup>2</sup> "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all

Appellant testified about the \$75,000 that he claimed to have paid Farmers Insurance at the prove-up hearing. His motion for reconsideration did nothing more than attempt to bring to the trial court's attention documentation that supported his testimony. This documentation was not a "new or different fact[]" under any conceivable interpretation of that phrase. It was the same fact shown by different evidence.

The trial court did not have the jurisdiction to grant appellant's motion. It follows that the court was correct in denying the motion.

### **DISPOSITION**

The judgment is affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

BIGELOW, J.

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applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (Code Civ. Proc., § 1008, subd. (e.)